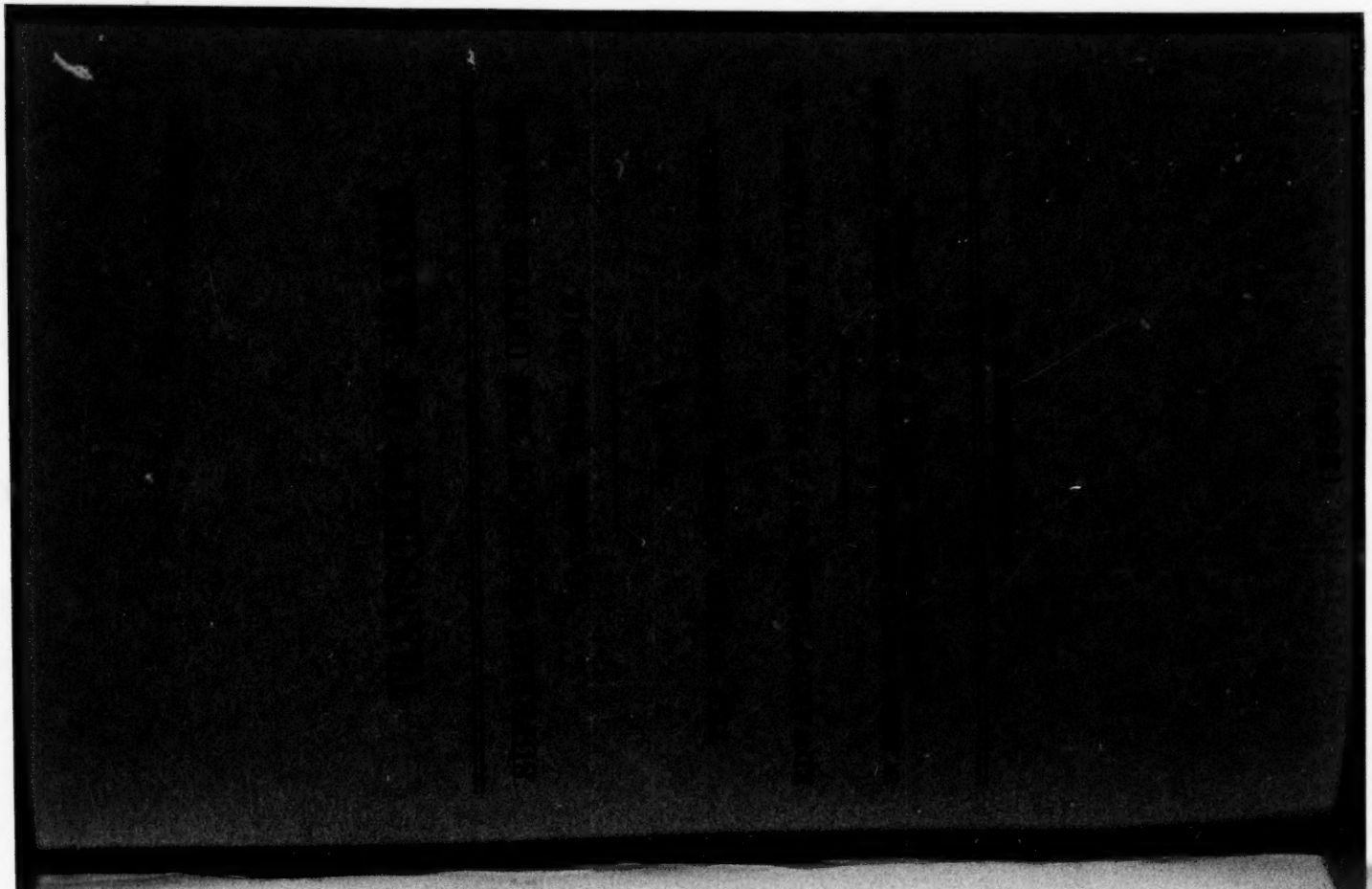

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1916.

No. 776.

THE UNITED STATES, PLAINTIFF IN ERROR,

vs.

EDWARD O'TOOLE, GUY C. MACE, JOHN M. TULLY ET AL.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA.

INDEX.

In the District Court of the United States for the Southern District of West Virginia, at Huntington.

The United States of America *vs.* No. 169 Upon an Ind. for vio. sec. 19 C. C., Edward O'Toole and others.

D. E. French, Esquire, Special Assistant to the Attorney General of the United States, and William G. Barnhart, Esquire, United States district attorney for the Southern District of West Virginia, for the United States of America, and plaintiff in error; John H. Holt, Esquire, of Holt, Duncan & Holt, William Gordon Mathews, Esquire, of McClintic, Mathews & Campbell, and Malcolm Jackson, Esquire, of Brown, Jackson & Knight, for defendants and defendants in error.

Be it remembered, that, heretofore, to wit: At a District Court of the United States for the Southern District of West Virginia, continued and held at Webster Springs, in said district, on Friday, the 25th day of August, A. D. 1916, the following order was made and entered of record.

ORDER.

The United States vs. No. 169, Upon an Ind. for vio. sec. 69 C. C., Edward O'Toole and others.

2 The grand jury appeared in court pursuant to retirement and presented an indictment against said defendants, endorsed "A true bill," which indictment is ordered to be filed.

The indictment referred to in the foregoing order is in the words and figures as follows:

INDICTMENT.

In the District Court of the United States of America for the Southern District of West Virginia.

Of the August term, in the year 1916.

Southern District of West Virginia, ss: The grand jurors for the United States of America, empaneled and sworn in the District Court of the United States for the Southern District of West Virginia at the August term thereof in the year 1916, held at Webster Springs, and inquiring for that district, upon their oath present, that, on the 6th day of June, 1916, a direct general primary election, under the laws of the State of West Virginia, for the nomination of candidates of political parties to be voted for at the general election to be held in said State on the 7th day of November, 1916, was held throughout the State of West Virginia, at which said primary election

candidates, for nominations for the office, among others, of Senator in the Congress of the United States, from said State of West Virginia, of the Republican and Democratic parties, were voted for by the people of said State; and that certain persons who then and there were citizens of said State and of the United States, and eligible to hold said office, to wit: Albert B. White, Howard Sutherland, Ben L. Rosenbloom, and William F. Hite, were candidates,
3 then duly qualified, under the laws of the State of West Virginia, as candidates, at said primary election, of the Republican Party, for said office of Senator in the Congress of the United States from said State.

And the grand jurors aforesaid, upon their oath aforesaid, do further present that Edward O'Toole, Guy C. Mace, John M. Tully, Abner N. Harris, William P. Kearns, Neil Friel, Willis W. Harding, Jesse H. Petty, Everett Woodson, Andrew T. Robertson, Roy E. Lee, John Young, John M. Davidson, Earl D. Strohecker, and Emmett Conner and I. H. Dunn, E. V. Albert, J. D. Jennings, A. E. Riley, and W. G. Martin, whose Christian names, respectively, are to said grand jurors unknown, each late of said Southern District of West Virginia, and being hereinafter referred to together as defendants, continuously and at all times throughout the period of time extending from the first day of May, in the year 1916, to and including said sixth day of June, in the same year, at and within said Southern District of West Virginia, unlawfully and feloniously did conspire, combine, confederate, and agree together, and with divers other persons to said grand jurors unknown, to injure and oppress said Albert B. White, Howard Sutherland, and Ben L. Rosenbloom, and each of them, citizens of said State of West Virginia and of the United States as aforesaid, in the free exercise and enjoyment of certain rights and privileges secured to them, and each of them, the said Albert B. White, Howard Sutherland, and Ben L. Rosenbloom, by the Constitution and laws of the United States; that is to say, in the free exercise and enjoyment of the right and privilege of having only the duly qualified Republican voters of said State of West Viriginia vote for some one of said Republican candidates at said primary election, the right and
4 privilege of having each Republican voter vote once only for some one of said candidates, and the right and privilege of having no votes cast, counted, certified, returned, or canvassed at said election for any candidate for the nomination for said office except such as were the votes of Republican voters duly qualified under the laws of said State; and that a description of the means and methods whereby said Albert B. White, Howard Sutherland, and Ben L. Rosenbloom were so to be injured and oppressed in the free exercise and enjoyment of their said rights and privileges by said defendants is as follows, to wit:

Said defendants, in order fraudulently to favor the candidacy of said William F. Hite and secure his nomination for said office instead of that of one of said other candidates, without regard to

the true preference and choice of said voters, were to procure and cause a large number of persons, to wit, one thousand persons, to vote at said primary election in Adkin district of McDowell County, in said State and Southern District of West Virginia, for said William F. Hite as such Republican candidate for said nomination for said office, and thereby secure the counting, certifying, returning, and canvassing, in due course, of the votes of said persons in favor of said William F. Hite for said nomination, when no one of said persons was, as each of said defendants, during said period, there well knew, qualified under the laws of said State to vote at said primary election, but all of said persons were disqualified to vote at said primary election by reason of the fact that none of them, as each of said defendants during said period there
5 well knew, had been a resident of said State for a sufficient length of time before said primary election to entitle him under the laws of said State to vote thereat; and said defendants were also to procure a large number, to wit, four hundred, of said persons to vote more than once for said William F. Hite at said primary election in said Adkin district, and thereby secure the counting, certifying, returning, and canvassing, in due course, of such fraudulently repeated votes of said last-mentioned persons in favor of said William F. Hite for said nomination.

Overt acts.

And the grand jurors aforesaid, upon their oath aforesaid, do further present that in pursuance of said unlawful and felonious conspiracy, combination, confederation, and agreement, and to effect the object of the same, certain of said defendants, at the several times and places in that behalf hereinafter mentioned in connection with their names, did do certain acts, as follows, that is to say:

1. Said Edward O'Toole at divers times during the period of time alleged in this indictment as aforesaid brought into said Adkin district, from other States than said State of West Virginia divers numbers, amounting in all to two hundred, persons, no one of whom then was or ever had been a resident of said State of West Virginia, for the purpose of causing them to cast their votes, respectively, one or more times for said William F. Hite at said primary election.

2. Said Guy C. Mace on June 1, 1916, at Gary, McDowell County, in said southern district of West Virginia prepared and caused to be prepared a large number, to wit, 2,500 copies of a paper
6 writing and memorandum, called a "slate," to be distributed among the persons who were so procured to vote at said primary election by said defendants as aforesaid for their use, respectively, in voting at said primary election for said William F. Hite, and as a reminder to them, respectively, that they were to vote for said William F. Hite and for no other one of said candidates at said primary election.

3. Said Guy C. Mace on June 6, 1916, at and within said Adkin district hired divers, to wit, seven, automobiles, with drivers, for

use in hauling divers of said persons who were so procured to vote at said primary election by said defendants as aforesaid from voting precincts in said Adkin district to other voting precincts in that district to vote more than once as aforesaid.

4. Said Andrew T. Robertson on June 6, 1916, at and within said Adkin district prepared divers, to wit, twenty affidavits in the form prescribed by the laws of said State of West Virginia in that behalf for the use of divers, to wit, twenty of said persons who were procured to vote at said primary election by said defendants as aforesaid in registering and casting their votes, respectively, thereat.

5. Said Edward O'Toole on June 6, 1916, at and within said Adkin district directed said William P. Kearns to conduct some number, to said grand jurors unknown, of said persons who were procured by said defendants to vote more than once at said primary election as aforesaid, from the fourth precinct in said district, after they had voted thereat in said primary election, to the third precinct in said district, for the purpose of voting again at said pri-

7 mary election in said last-named precinct.

6. Said Andrew T. Robertson, on June 6, 1916, at and within said Adkin District, sent and conveyed some number, to said grand jurors unknown, of the persons who were so procured by said defendants to vote more than once at said primary election, as aforesaid, from the third precinct of said district, after they had voted thereat in said primary election, to the second precinct of said district, for the purpose of voting again in said primary election at said last-named precinct.

7. Said John M. Tully, on June 6, 1916, at and within said Adkin District, sent and conveyed some number, to said grand jurors unknown, of the persons who were so procured by said defendants to vote more than once at said primary election, as aforesaid, from the second precinct of said district, after they had voted thereat in said primary election to the third precinct of said district, for the purpose of voting again at said last-named precinct in said primary election.

8. Said Andrew T. Robertson, on June 6, 1916, at and within said Adkin District, a short time before the closing of the polls at said primary election, prepared a list of the names of voters registered in the third precinct of said district, who had not voted up to that time in said primary election, for the use of the persons respectively, who were so procured by said defendants to vote more than once at said primary election, as aforesaid, in voting in said primary election in other names than their own names, to wit, in the names of said persons who were registered but had not yet voted in said primary election in said third precinct.

8 CONCLUSION.

And so the grand jurors aforesaid, upon their oath aforesaid, do say, that said Edward O'Toole, Guy C. Mace, John M. Tully, Abner N. Harris, William P. Kearns, Neil Friel, Willis W. Harding,

Jesse H. Petty, Everett Woodson, Andrew T. Robertson, Roy E. Lee, John Young, John M. Davidson, Earl D. Strohecker, Emmett Conner, I. H. Dunn, E. V. Albert, J. D. Jennings, A. E. Riley, and W. G. Martin, during the period of time, at the place, and in manner and form, aforesaid, unlawfully and feloniously did conspire to injure and oppress citizens in the free exercise and enjoyment of rights and privileges secured to them by the Constitution and laws of the United States, against the peace and dignity of the United States, and contrary to the form of the statute of the same in such case made and provided.

WILLIAM G. BARNHART,
United States Attorney.

Upon the evidence of W. E. Hansen, W. R. Harper, W. S. Popejoy, K. G. Wright, and D. G. Lilly, witnesses sworn in open court to give evidence before the grand jury.

(Endorsed:) Filed August 25, 1916, Edwin M. Keatley, Clerk.

And on the same day, to wit, at a district court of the United States for the Southern District of West Virginia, continued and held at Webster Springs, in said district, on Friday, the 25"
9 day of August, A. D. 1916, the following order was made and entered of record:

ORDER.

The United States vs. No. 169, upon an ind. for vio. sec. 19 C. C., Edward O'Toole and others.

This day came the district attorney, and on his motion this cause is remitted to the United States District Court for the Southern District of West Virginia, sitting at Huntington, for further proceedings to be had therein.

Thereupon Wm. R. Harper, W. S. Popejoy, K. G. Wright, W. E. Hansen, and D. G. Lilly, witnesses in this cause, here in open court entered into a recognizance in the sum of one hundred dollars each, conditioned for their appearance before the judge of this court at Huntington, on the first day of the next term.

And at another day, to wit: At a District Court of the United States for the Southern District of West Virginia, continued and held at Huntington, in said district, on Friday, the 1" day of September, A. D. 1916, the following order was made and entered of record:

ORDER.

The United States vs. No. 169, upon an ind. for vio. sec. 19 C. C., Edward O'Toole and others.

This day came the district attorney, and on his motion this cause lately pending in the District Court of the United States for the

Southern District of West Virginia, sitting at Webster
10 Springs, and which was remitted here, is on his motion docketed herein for further proceedings.

And at another day, to wit: At a District Court of the United States for the Southern District of West Virginia, continued and held at Huntington, in said district, on Wednesday, the 20″ day of September, A. D. 1916, the following judgment was made and entered of record:

JUDGMENT.

The United States vs. No. 169, upon an ind. for vio. sec. 19 C. C., Edward O'Toole and others.

This day came as well the district attorney and D. E. French, Esquire, special assistant to the Attorney General of the United States, as the defendants Edward O'Toole, Guy C. Mace, John M. Tully, Abner N. Harris, William P. Kearns, Neil Friel, Willis W. Harding, Jesse H. Petty, Everett Woodson, Andrew T. Robertson, Roy E. Lee, John Young, John M. Davidson, Earl D. Strohecker, Emmett Conner, I. H. Dunn, E. V. Albert, J. D. Jennings, A. E. Riley, and W. G. Martin, each in his proper person, and by John H. Holt, Esquire, Malcolm Jackson, Esquire, and W. G. Mathews, Esquire, their counsel; and thereupon the said defendants tendered their joint and several demurrer to the said indictment and moved to quash the same, which demurrer was ordered to be filed, and in which demurrer the United States joins; and the matters of law arising upon said demurrer being argued at length by counsel, as well as for the United States as for said defendants, and each of them, was submitted to the court, and the court being of the opinion that the law is for the defendants, and for reasons stated in writing
and this day filed and made a part of the record in this cause,
11 that the said indictment charges no offense under the Constitution or laws of the United States, the said demurrer is sustained as to said defendants and each of them, to which action and ruling of the court the United States objects and excepts.

And the court here now proceeding to render judgment upon the demurrer and motion to quash as aforesaid, it is considered by the court that the said indictment be quashed and that said defendants Edward O'Toole, Guy C. Mace, John M. Tully, Abner N. Harris, William P. Kearns, Neil Friel, Willis W. Harding, Jesse H. Petty, Everett Woodson, Andrew T. Robertson, Roy E. Lee, John Young, John M. Davidson, Earl D. Strohecker, Emmett Conner, I. H. Dunn, E. V. Albert, J. D. Jennings, A. E. Riley, and W. G. Martin be discharged from said indictment and go hence without day.

And thereupon the United States, by its attorneys, prays for a writ of error in this cause from this court to the Supreme Court of the United States, which prayer is granted, and said writ is ordered to be issued.

The demurrer referred to in the foregoing order is in the words and figures as follows:

DEMURRER.

In the District Court of the United States of America for the Southern District of West Virginia at Huntington.

The United States vs. No. 169, upon an ind. for vio. sec. 19, C. C., Edward O'Toole and others.

The joint and separate demurrer of Edward O'Toole, Guy C. Mace, John M. Tully, Abner N. Harris, William P. Kearns,
12 Neil Friel, Willis W. Harding, Jesse H. Petty, Everett Woodson, Andrew T. Robertson, Roy E. Lee, John Young, John M. Davidson, Earl D. Strohecker, Emmett Conner, I. H. Dunn, E. V. Albert, J. D. Jennings, A. E. Riley, and W. G. Martin to the indictment presented herein against them.

And now come the above-named defendants, and each of them, by their attorneys, and jointly and severally demur to the indictment herein filed against them, and for cause thereof say:

1. The election alleged in the indictment was not an election for a United States Senator or other officer, but was solely a primary election to nominate candidates for office, and was created and governed wholly by the laws of the State of West Virginia, and any and all rights at or in said election were derived under the laws of said State and not in any manner under the Constitution or laws of the United States, and the matters and things alleged in the indictment, or any of them, did not, and do not, constitute an interference with any right or privilege secured to the said Albert B. White, Howard Sutherland, and Ben L. Rosenbloom, or either of them, by the Constitution or laws of the United States; but their said rights and privileges, and the rights and privileges of each of them, as candidates in the primary election for the nomination to the office of United States Senator from the State of West Virginia, were guaranteed to them by, and are exclusively dependent upon, the laws of said State, and said indictment does not allege any offense of which this court has or can take jurisdiction.

2. Because section 19 of the Criminal Code relates solely to conspiracies against the exercise or enjoyment of personal and individual rights and privileges secured to citizens under the
13 Constitution and laws of the United States, and the alleged rights and privileges in said indictment set forth as secured to Albert B. White, Howard Sutherland, and Ben L. Rosenbloom do not constitute rights or privileges so secured.

3. Because the matters and things alleged therein do not constitute any offense against the laws or sovereignty of the United States, and,

4. Because said indictment is in other respects informal, insufficient, and defective.

Wherefore said defendants, and each of them, pray judgment of said indictment, and that the same may be quashed, etc.

JOHN H. HOLT,
MALCOLM JACKSON,
W. G. MATHEWS,
Attorneys for Defendants.

(Endorsed:) Filed September 20, 1916. Edwin M. Keatley, clerk.

The opinion referred to in the foregoing order is in the words and figures as follows:

OPINION.

In the District Court of the United States of America for the Southern District of West Virginia, at Huntington.

United States of America vs. No. 169, upon an ind. for vio. sec. 19 C. C., Edward O'Toole and others.

WOODS, *Circuit Judge:*

The defendants have demurred to two indictments found
14 against them. The first charges that in a primary election held throughout the State of West Virginia on June 6, 1916, for the nomination of United States Senator and certain other officers of the United States, the defendants, Edward O'Toole, Guy C. Mace, John M. Tully, Abner N. Harris, William P. Kearns, Neil Friel, Willis W. Harding, Jesse H. Petty, Everett Woodson, Andrew T. Robertson, Roy E. Lee, John Young, John M. Davidson, Earl D. Strohecker, and Emmett Conner, and I. H. Dunn, E. V. Albert, J. D. Jennings, A. E. Riley, and W. G. Martin, by procuring about a thousand unqualified voters to vote in said election and by repeating 400 of their votes, conspired to injure and defraud Albert B. White, Howard Sutherland, and Ben. L. Rosenbloom, candidates for such offices, in the free exercise and enjoyment of certain rights and privileges secured to them by the constitution and laws of the United States, namely, the right to have only the duly qualified Republican voters of West Virginia to vote for the nominees and for them to vote only once.

This indictment is brought under section 19 of the Criminal Code of the United States, which provides:

"If two or more persons conspire to injure, oppress, threaten, or intimidate any citizen in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States, or because of his having so exercised the same, they shall be fined, etc."

The second indictment charges that in a primary election held throughout the State of West Virginia on June 6, 1916, for the nomination of United States Senator and certain other officers of the United States, the defendants named in the above indictment, by procuring about a thousand unqualified voters to vote in said election

and by repeating 400 of their votes conspired to defraud the United States in the matter of its governmental right to have the
15 candidates of the true choice and preference of the Republican and Democratic Parties nominated for the office of Senator, and one of them elected and returned to the Senate and given the salary lawfully attaching to the office to the exclusion of all other persons. This indictment is brought under section 37 of the Criminal Code of the United States, which provides:

"If two or more persons conspire either to commit any offense against the United States, or to defraud the United States in any manner or for any purpose, and one or more of such parties do any act to effect the object of the conspiracy, each of the parties to such conspiracy shall be fined, etc.,"

The first and comprehensive question raised by the demurrer is whether the citizens of the United States are protected in the electoral rights conferred under the laws of the State of West Virginia providing for the selection of candidates of political parties for the office of United States Senator to be voted for at the general election.

The right of an elector having the requisite qualifications to vote for a Member of the House of Representatives or for United States Senator, and to have his vote counted, is derived from the Constitution and laws of the United States, and is protected by section 19 of the Criminal Code above quoted. Wiley v. Sinkler, 179 U. S., 58, Ex parte Yarbrough, 110 U. S., 651; Swafford v. Templeton, 185 U. C., 487; United States v. Mosley, 238 U. S., 383.

Up to a recent date there were no State laws regulating the methods of nomination of political parties. These parties were founded on voluntary association of citizens, and they made their nominations and conducted their affairs without legislative sanction. The candidates were named by caucuses, conventions, or primary elec-
16 tions as the several parties determined. The nomination by a political party, whether by caucus, convention, or primary, is nothing more than an endorsement and recommendation of the nominee to the suffrage of the electors at large. In passing statutes regulating primary elections a State recognizes the important fact that candidates go into the general elections with endorsement of political parties, and it merely provides the conditions upon which that endorsement is to be received. The endorsement of the primary contributes nothing to the legal eligibility of a candidate at the general election. It may be that every citizen eligible under the Constitution of the United States has a political right to be a candidate for United States Senator, but he has no political right derived under the Constitution or statutes of the United States to present himself to the electorate with the advantage of endorsement of any political party, nor has he any right to question the method by which any other person may obtain such an endorsement.

It may be true also that the Congress of the United States has the legislative power to provide rules regulating the primaries for

United States Senators and Members of the House of Representatives, but unless it has provided such rules, either directly or by necessary implication, a candidate can have no Federal right in the endorsement which any political party may undertake to give under the laws of a State.

It certainly can not be successfully contended that the incidental recognition of the existence of primaries by providing for the expenses to be incurred therein by candidates for the House of Representatives and the Senate is an adoption as Federal legislation of State statutes on the subject. The Congress may adopt State
17 legislation and thus give it the sanction of its own legislative power (In re Coy 127, U. S., 731, Ex parte Siebold, 101 U. S., 371, Ex parte Yarbrough, 110 U. S., 651); and it is insisted by the prosecution that Congress has acted and adopted the State statutes by the following enactment of June 4, 1914:

"Chap. 103. An act providing a temporary method of conducting the nomination and election of United States Senators.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That at the regular election held in any State next preceding the expiration of the term for which any Senator was elected to represent such State in Congress, at which election a Representative to Congress is regularly by law to be chosen, a United States Senator from said State shall be elected by the people thereof for the term commencing on the fourth day of March next thereafter.

"SEC. 2. That in any State wherein a United States Senator is hereafter to be elected either at a general election or at any special election called by the executive authority thereof to fill a vacancy, until or unless otherwise specially provided by the legislature thereof, the nomination of candidates for such office not heretofore made shall be made, the election to fill the same conducted, and the result thereof determined, as near as may be in accordance with the laws of such State regulating the nomination of candidates for an election of Members at Large of the National House of Representatives: Provided, That in case no provision is made in any State for the nomination or election of Representatives at Large, the procedure shall be in accordance with the laws of such State respecting the ordinary executive and administrative officers thereof who are elected by the vote of the people of the entire State: And provided further, That in any case the candidate for Senator receiving
18 the highest number of votes shall be deemed elected.

"SEC. 3. That section two of this act shall expire by limitation at the end of three years from the date of its approval. Approved June 4, 1914."

At the time this statute was passed the State of West Virginia had no act upon the subject. If it applied to West Virginia at all it applied by its terms only until the State of West Virginia passed

an act providing a primary election for the selection by the several political parties of the candidates to be presented by them for the suffrage of the people at the general election. After the State legislature acted the Federal statute by its terms could have no application to that State. The provision that the Federal statute should cease to be operative as soon as State legislation on the subject was enacted, the provision that the act should expire by its own limitation at the end of three years from the date of its approval, together with the title of the act, show plainly that it was intended to meet a temporary exigency. Also these provisions show a distinct purpose by Congress to relinquish all control and leave to the States absolute authority over the selection of party candidates for the United States Senate as soon as they had actually passed laws on the subject. There is no other constitutional provision or Federal statute relating to Federal control over primary elections.

We think it may be said both on reason and authority that where the word "election" is used without qualification the reference is to a general election as distinguished from a primary election. State v. Johnson, 87 Minn. 221, 91 N. W. 604; Montgomery v. Chelf, 118 Ky. 766, 82 S. W. 388; Gray v. Seitz, 162 Ind. 1, 69 N. E. 456;

Elliott v. Thompson (Fed.) post.

19 Certainly it cannot be contended that the choosing or election by the qualified electors provided for by section 2 of Art. 1 of the Constitution of the United States includes the selection of party candidates by primary election, for at that time such elections were unknown. We can find no provision of the Constitution of the United States or of an act of Congress which either directly or by implication warrants the court in holding that the protection of the Federal Government extends to the right of any citizen to participate in a party endorsement of a candidate through a primary election or otherwise. The right is created by party rules or State legislation, and the remedy, if there be one, must be derived from the same source. The conclusion we have reached is sustained by a well-considered opinion of Judge Booth in the District Court for the Western District of Missouri in Elliott v. Thompson, decided on October 2, 1915.

We conclude that the indictments charge no conspiracy to injure, oppress, threaten, or intimidate a citizen in the free exercise and enjoyment of any right secured to him by the Constitution or statutes of the United States, or because of having exercised the same, or to commit any offense against the United States, or to defraud the United States in any manner or for any purpose. The demurrers are therefore sustained. 9/21/16.

(Endorsed:) Filed September 21, 1916. Edwin M. Keatley, clerk.

And at another day, to wit: At a District Court of the United States for the Southern District of West Virginia, continued and

held at Huntington, in said district, on Thursday, the 19'' day of October, A. D. 1916, the following order was made and entered of record:

20 ORDER.

The United States vs. No. 169, upon an ind. for vio. sec. 19 C. C., Edward O'Toole and others.

This day came the United States attorney and presented to the court a petition for a writ of error, accompanied by an assignment of errors, praying that this cause may be reviewed in the Supreme Court of the United States; which petition for a writ of error and assignment of errors are ordered to be filed; and it is ordered that a writ of error to the judgment of the District Court of the United States for the Southern District of West Virginia, sitting at Huntington, entered in this cause, be allowed. And it is ordered that a duly certified transcript of the record and proceedings in this cause be forwarded to the Supreme Court of the United States at Washington.

The petition for a writ of error and assignment of errors referred to in the foregoing order are in the words and figures as follows:

PETITION FOR WRIT OF ERROR.

District Court of the United States for the Southern District of West Virginia.

United States of America vs. No. 169, upon an ind. for vio. sec. 19 C. C., Edward O'Toole and others.

Now comes the United States of America, by its attorney, William G. Barnhart, and complains that in the record and proceedings had in this cause and in the order and judgment sustaining the demurrer to the indictment herein, and sustaining defendants' motion

21 to quash the indictment herein and dismissing said indictment, which judgment was duly made and filed in the office of the clerk of the United States District Court for the Southern District of West Virginia on September 20, 1916, a manifest error has happened, as will appear in the assignment of errors herewith submitted.

Wherefore, the United States of America prays for the allowance of a writ of error, and for such other orders and process as may cause the same to be corrected by the Supreme Court of the United States.

Dated: Charleston, West Virginia, October 16, 1916.

WILLIAM G. BARNHART,
United States Attorney.

(Endorsed:) Filed October 19, 1916. Edwin M. Keatley, Clerk.

ASSIGNMENT OF ERRORS.

District Court of the United States for the Southern District of West Virginia.

United States of America, vs. No. 169, upon an ind. for vio. sec. 19 C. C., Edward O'Toole and others.

The United States of America, in connection with its petition for a writ of error, makes the following assignment of errors, which it avers occurred in the decision of the court herein, sustaining defendants' demurrer and motion to quash the indictment.

22 I. The court erred in holding as a matter of law that the said United States of America is without jurisdiction, under the provisions of section 19 of the criminal code of the United States, of the matters alleged in counts one, two, and three of the indictment.

II. The court erred in sustaining the demurrer to the indictment.

III. The court erred in sustaining the motion to quash the indictment.

Wherefore the United States of America prays that the judgment of the District Court of the United States for the Southern District of West Virginia, be, under the act of Congress approved March 2, 1907, reviewed by the Supreme Court of the United States, and said judgment be reversed.

WILLIAM G. BARNHART,
United States Attorney for the Southern District of West Virginia.

(Endorsed:) Filed October 19, 1916. Edwin M. Keatley, Clerk.

Upon the entry of the foregoing order there was issued from the office of the clerk of the District Court of the United States for the Southern District of West Virginia, a writ of error to the judgment herein, said writ of error being in the words and figures as follows:

WRIT OF ERROR.

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judge of the District Court of the United States for the Southern
23 *District of West Virginia, greeting:*

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said District Court of the United States for the Southern District of West Virginia, before you, or some of you, between The United States of America, plaintiff, and Edward O'Toole, Guy C. Mace, John M. Tully, Abner N. Harris, William P. Kearns, Neil Friel, Willis W. Harding, Jesse H. Petty, Everett Woodson, Andrew T. Robertson, Roy E. Lee,

John Young, John M. Davidson, Earl D. Strohecker, and Emmett Conner, and I. H. Dunn, E. V. Albert, J. D. Jennings, A. E. Riley, and W. G. Martin, defendants, a manifest error hath happened, to the great damage of the said The United States of America, as by its complaint appears. We, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington within 30 days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Edward D. White, Chief Justice of the United States, the 19" day of October, in the year of our Lord one thousand nine hundred and sixteen.

[SEAL OF COURT.] EDWIN M. KEATLEY,
Clerk of the United States District Court for the Southern District of West Virginia.

24 Allowed by Hon. Benj. F. Keller, judge of the United States District Court for the Southern District of West Virginia.

CERTIFICATE OF SERVICE.

The foregoing writ of error has been duly served by the filing of a duly attested copy thereof in the office of the clerk of said court on this the 19" day of October, A. D. 1916.

Attest:

EDWIN M. KEATLEY, *Clerk.*

Upon the awarding of said writ of error there was issued a citation to the said defendants, and each of them, which, together with the acceptance of service thereon, are in the words and figures as follows:

CITATION.

UNITED STATES OF AMERICA, *ss:*

To Edward O'Toole, Guy C. Mace, John M. Tully, Abner N. Harris, William P. Kearns, Neil Friel, Willis W. Harding, Jesse H. Petty, Everett Woodson, Andrew T. Robertson, Roy E. Lee, John Young, John M. Davidson, Earl D. Strohecker, and Emmett Conner, and I. H. Dunn, E. V. Albert, J. D. Jennings, A. E. Riley, and W. G. Martin, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States at Washington within 30 days from the

date hereof, pursuant to a writ of error filed in the clerk's office of the District Court of the United States for the Southern
25 District of West Virginia, wherein the United States of America is plaintiff in error and you are defendants in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Benj. F. Keller, Judge of the United States District Court for the Southern District of West Virginia, this 19" day of October, in the year of our Lord one thousand nine hundred and sixteen.

[SEAL OF COURT.]

BENJ. F. KELLER,
Judge of the United States District Court for the Southern District of West Virginia.

ACCEPTANCE OF SERVICE.

Service of the within citation is accepted this 31st day of October, A. D. 1916, for and on behalf of Edward O'Toole, Guy C. Mace, John M. Tully, Abner N. Harris, William P. Kearns, Neil Friel, Willis W. Harding, Jesse H. Petty, Everett Woodson, Andrew T. Robertson, Roy E. Lee, John Young, John M. Davidson, Earl D. Strohecker, and Emmett Conner, and I. H. Dunn, E. V. Albert, J. D. Jennings, A. E. Riley, and W. G. Martin, to have the same effect and none other, as if served by the United States marshal for the Southern District of West Virginia.

JOHN H. HOLT,
WM. GORDON MATHEWS,
Attorneys for above-named defendants.

CLERK'S CERTIFICATE.

UNITED STATES OF AMERICA,
Southern District of West Virginia, ss:

26 I, Edwin M. Keatley, clerk of the District Court of the United States for the Southern District of West Virginia, do certify that the foregoing is a true and complete transcript of the record and proceedings on writ of error in the case of the United States of America vs. Edward O'Toole and others, and now of record in my office.

In testimony whereof, I hereto set my hand and the seal of said court, at Huntington, in said district this the 1st day of November, A. D. 1916, and in the 141" year of the Independence of the United States of America.

[SEAL.]

EDWIN M. KEATLEY,
Clerk, D. C. U. S. S. D. W. Va.

27 UNITED STATES OF AMERICA, *ss:*

The President of the United States, to the honorable the judge of the District Court of the United States for the Southern District of West Virginia, greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Dist. Ct. U. S., So. Dist. of W. Va., before you, or some of you, between the United States of America, plaintiff, and Edward O'Toole, Guy C. Mace, John M. Tully, Abner N. Harris, William P. Kearns, Neil Friel, Willis W. Harding, Jesse H. Petty, Everett Woodson, Andrew T. Robertson, Roy E. Lee, John Young, John M. Davidson, Earl D. Strohecker, and Emmett Conner, and I. H. Dunn, E. V. Albert, J. D. Jennings, A. E. Riley, and W. G. Martin, defendants, a manifest error hath happened, to the great damage of the said the United States of America, as by its complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within 30 days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness the Honorable Edward D. White, Chief Justice of the United States, the 19th day of October, in the year of our Lord one thousand nine hundred and sixteen.

[SEAL.] EDWIN M. KEATLEY,
Clerk of the United States District Court for the Southern District of West Virginia.

Allowed by Hon. Benj. F. Keller, judge of the United States District Court for the Southern District of West Virginia.

28 UNITED STATES OF AMERICA, *ss:*

To Edward O'Toole, Guy C. Mace, John M. Tully, Abner N. Harris, William P. Kearns, Neil Friel, Willis W. Harding, Jesse H. Petty, Everett Woodson, Andrew T. Robertson, Roy E. Lee, John Young, John M. Davidson, Earl D. Strohecker, and Emmett Conner, and I. H. Dunn, E. V. Albert, J. D. Jennings, A. E. Riley, and W. G. Martin, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within 30 days from the date hereof, pursuant to a writ of error, filed in the clerk's office of the District Court of the United States for the Southern District of West Virginia, wherein the United States of America is

plaintiff in error and you are defendants in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Benj. F. Keller, judge of the United States District Court for the Southern District of West Virginia, this 19" day of October, in the year of our Lord one thousand nine hundred and sixteen.

BENJ. F. KELLER,
Judge of the United States District Court
for the Southern District of West Virginia.

29 ACCEPTANCE OF SERVICE.

Service of the within citation is accepted this 31st day of October, A. D. 1916, for and on behalf of Edward O'Toole, Guy C. Mace, John M. Tully, Abner N. Harris, William P. Kearns, Neil Friel, Willis W. Harding, Jesse H. Petty, Everett Woodson, Andrew T. Robertson, Roy E. Lee, John Young, John M. Davidson, Earl D. Strohecker, and Emmett Conner, and I. H. Dunn, E. V. Albert, J. D. Jennings, A. E. Riley, and W. G. Martin, to have the same effect and none other as if served by the United States marshal for the Southern District of West Virginia.

JOHN H. HOLT,
WM. GORDON MATHEWS,
Attorneys for above-named defendants.

(Endorsement on cover:) File No. 25,606. S. West Virginia D. C. U. S. Term No. 776. The United States, plaintiff in error, vs. Edward O'Toole, Guy C. Mace, John M. Tully, et al. Filed November 13th, 1916. File No. 25,606.

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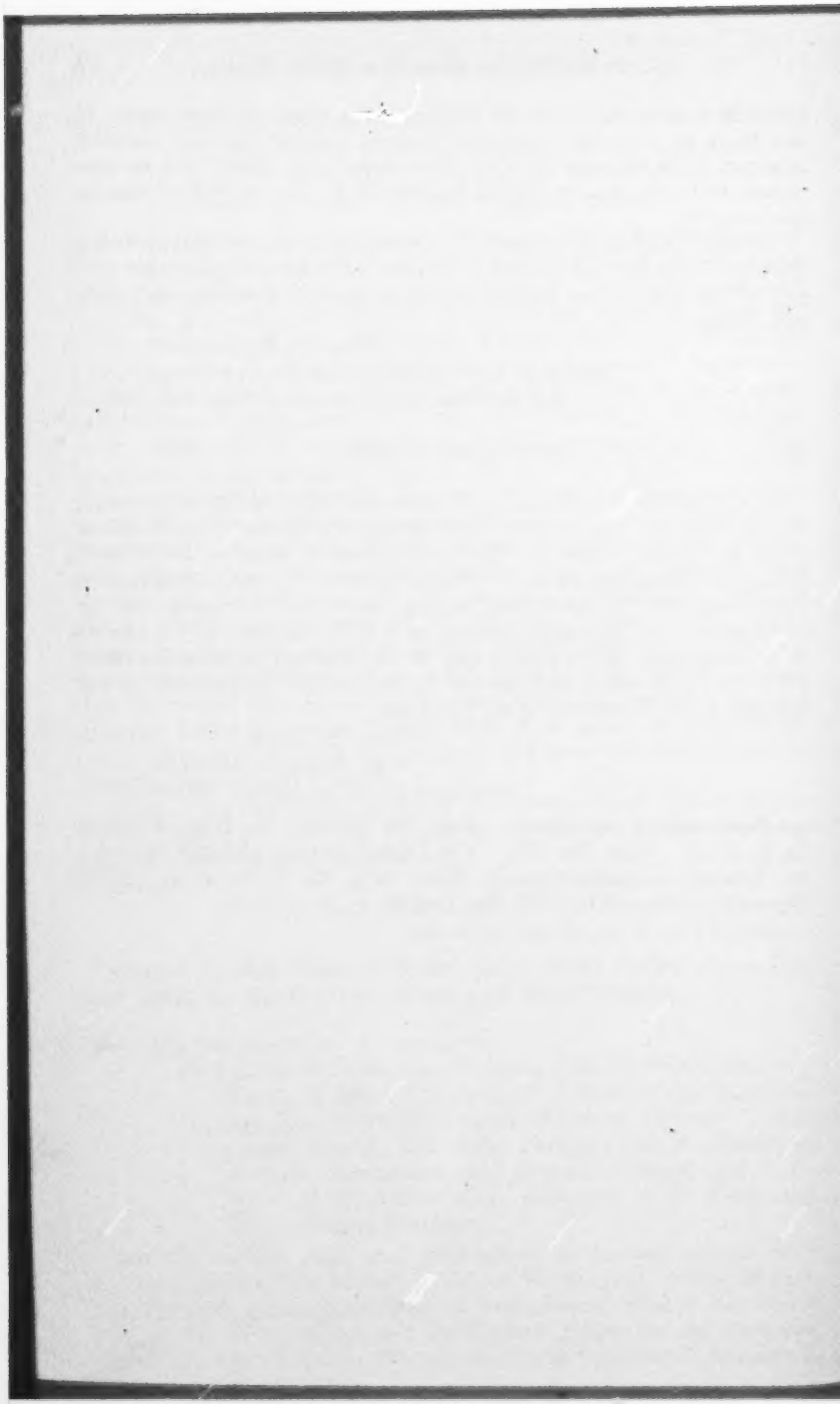

In the Supreme Court of the United States.

OCTOBER TERM, 1916.

THE UNITED STATES, PLAINTIFF IN ERROR, v. EDWARD O'TOOLE ET AL. } No. 775.

THE UNITED STATES, PLAINTIFF IN ERROR, v. EDWARD O'TOOLE ET AL. } No. 776.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA.

MOTION BY THE UNITED STATES TO ADVANCE.

Comes now the Solicitor General and in accordance with the provisions of the Criminal Appeals Act, 34 Stat. 1246, respectfully moves the court to advance the above-entitled causes for joint hearing on a day convenient to the court.

Two indictments were returned against defendants in the District Court of the United States for the Southern District of West Virginia.

No. 775 was an indictment charging a conspiracy to injure, etc., certain candidates for the Repub-

lican nomination for the office of United States Senator from West Virginia in the free enjoyment of the right secured by the Constitution and laws of the United States to have only the qualified Republican voters of West Virginia to vote for the nominees for said office and to vote for them but once in a certain primary election held in said State, by procuring certain unqualified voters to vote in said election and by procuring the repetition of a certain number of said votes, in violation of section 19 of the Criminal Code.

No. 776 was an indictment charging defendants with a conspiracy to defraud the United States by procuring in said primary election the unqualified votes mentioned in the indictment in No. 775 and by procuring the repetition of a certain number of said votes, thereby defrauding the United States of its governmental right to have nominated as candidates of the Republican and Democratic parties for the office of United States Senator from said State the true choice and preference of the voters in said primary election, and to have one of said candidates lawfully elected to the Senate of the United States and given the salary attaching to said office, in violation of section 37 of the Criminal Code.

Demurrers to the indictments were sustained on the ground *inter alia* that the right of an elector or citizen to vote for a candidate for the United States Senate derived from the Constitution does

not obtain in a State primary election where candidates for the office are chosen, and the protection of such right is confined only to the general election at which one of the candidates is to be elected.

Notice of this motion has been served on opposing counsel.

JOHN W. DAVIS,
Solicitor General.

NOVEMBER, 1916.

○

Supreme Court of the United States

OCTOBER TERM, 1916.

Nos. 775 and 776.

THE UNITED STATES, Plaintiff in Error,

VS.

EDWARD O'TOOLE, GUY C. MACE, JOHN M. TULLY ET AL., Defendants in Error.

THE UNITED STATES, Plaintiff in Error,

VS.

EDWARD O'TOOLE, GUY C. MACE, JOHN M. TULLY ET AL., Defendants in Error.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA.

BRIEF FOR DEFENDANTS IN ERROR.

JOHN H. HOLT,
LUTHER C. ANDERSON,
Counsel for Defendants in Error.

February 26, 1917.

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Supreme Court of the United States

OCTOBER TERM, 1916.

Nos. 775 and 776.

THE UNITED STATES, Plaintiff in Error,
VS.
EDWARD O'TOOLE, GUY C. MACE, JOHN M. TULLY ET AL., Defendants in Error.

THE UNITED STATES, Plaintiff in Error,
VS.
EDWARD O'TOOLE, GUY C. MACE, JOHN M. TULLY ET AL., Defendants in Error.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA.

BRIEF FOR DEFENDANTS IN ERROR.

STATEMENT OF CASE.

NO. 776.

At a general primary election held in the State of West Virginia on the 6th day of June, 1916, under

her primary law of February 20, 1915, for the nomination of candidates for office to be voted for at the general election to be held on November 7, 1916, Albert B. White, Howard Sutherland, Ben. L. Rosenbloom and William F. Hite were opposing candidates for the nomination of the Republican party to the office of United States Senator from the State of West Virginia. The defendants, Edward O'Toole and twenty others, were supposed to be favorable to the candidacy of Hite, and were charged with having colonized and repeated voters in the interest of his candidacy, and were finally indicted in the United States District Court for the Southern District of West Virginia with having conspired to injure and oppress said White, Sutherland, and Rosenbloom in the free exercise and enjoyment of certain rights and privileges secured to them by the Constitution and laws of the United States.

The indictment was based upon Section 19 of the Federal Criminal Code, which, in so far as its verbiage is applicable to the case in hand, reads as follows:

> "Sec. 19. If two or more persons conspire to injure, oppress, threaten or intimidate any citizen in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States, * * * * * * * * * * * * * they shall be fined not more than five thousand dollars and imprisoned not more than ten years, and shall, moreover, be thereafter ineligible to any office, or place of honor, profit or trust created by the Constitution or laws of the United States."

The defendants appeared and demurred to the indictment upon the following, among other, grounds:

"1. The election alleged in the indictment was not an election for a United States Senator or other officer, but was solely a primary election to nominate candidates for office, and was created and governed wholly by the laws of the State of West Virginia, and any and all rights at or in said election were derived under the laws of said State, and not in any manner under the Constitution or laws of the United States, and the matters and things alleged in the indictment, or any of them, did not, and do not, constitute an interference with any right or privilege secured to the said Albert B. White, Howard Sutherland and Ben L. Rosenbloom, or either of them, by the Constitution or laws of the United States; but their said rights and privileges, and the rights and privileges of each of them, as candidates in the primary election for the nomination to the office of United States Senator from the State of West Virginia, were guaranteed to them by, and are exclusively dependent upon, the laws of said State, and said indictment does not allege any offense of which this Court has or can take jurisdiction.

2. Because Section 19 of the Criminal Code relates solely to conspiracies against the exercise or enjoyment of personal and individual rights and privileges secured to citizens under the Constitution and laws of the United States, and the alleged rights and privileges in said indictment set forth as se-

cured to Albert B. White, Howard Sutherland and Ben. L. Rosenbloom do not constitute rights or privileges so secured.

3. Because the matters and things alleged therein do not constitute any offense against the laws or sovereignty of the United States."

The demurrer was heard before and sustained by Circuit Judge Woods in a written opinion, which, by order of Court, is made a part of the record (pages 8-11), and is reported in 236 Fed., 63. Final judgment for the defendants was entered upon the demurrer, and the Government prosecutes the present writ of error thereto.

ARGUMENT.

This indictment is based on Section 19 of the Federal Criminal Code, which is a highly penal statute, and is subject, therefore, to strict construction.

United States v. Wiltberger, 5 Wheaton, 85.

The specific thing complained of in this indictment is an alleged conspiracy on the part of the defendants to deprive certain citizens of the State of West Virginia and of the United States of the free exercise and enjoyment of certain rights and privileges guaranteed and secured to them under the Constitution and laws of the United States.

The basis of the indictment is the allegation that the defendants conspired to injure and oppress Albert B. White, Howard Sutherland and Ben L. Rosenbloom, citizens of the State of West Virginia,

and of the United States, in the free exercise and enjoyment of certain rights secured to them and each of them by the Constitution and laws of the United States, to wit:—the free exercise and enjoyment of the right and privilege of having only the duly qualified Republican voters of the said State of West Virginia vote for some one of said Republican candidates at said primary election, the right and privilege of having each Republican voter vote once only for some one of said candidates, and the right and privilege of having no votes cast, counted, certified and returned at said election for any candidate for the nomination of said office, except such as were the votes of the Republican voters, duly qualified under the laws of the said State; against the peace and dignity of the United States, and contrary to the form of the statute in such case made and provided.

The particular right asserted and relied on by the Government is that citizens of the United States are protected by the Constitution and laws of the United States in the exercise and enjoyment of rights and privileges created and conferred on duly qualified members of certain political parties by the laws of the State of West Virginia for the selection of candidates of such political parties for the office of United States Senator to be voted for at a subsequent election.

In order to determine as to the correctness of the ruling of the lower court in sustaining the demurrer to the indictment, it will be necessary to consider citizenship under our dual form of government, and to determine the rights of citizens of the State of West Virginia and of citizens of the United

States, respectively, arising out of and by virtue of the fact that they are citizens both of the State and of the United States; what are the kinds and character of the rights secured to such citizens by the State and Federal Governments, respectively; by what authority are such rights secured and protected; in which government, State or Federal, do the rights of citizens pertaining to the elective franchise originate, and by what authority are they protected and enforced; all with reference to the Constitution and laws of the Unitetd States and the Constitution and laws of the Statte of West Virginia, and with special reference to the basis and origin of the elective franchise of citizens and of its governmental assurance and protection.

STATE AND FEDERAL GOVERNMENTS.

The people of the United States, resident within any State, are subject to two governments, one State and the other National, established for different purposes, possessed of different powers, exercising separate jurisdictions, each supreme in its own particular sphere, and together forming one complete government for the protection of all citizens of both.

United States v. *Cruikshank*, 92 U. S., 542.

CITIZENSHIP.

There is a citizenship of the United States and also a citizenship of the respective States, and the same person may be, at the same time, a citizen of both. He has certain rights, both as a citizen of the

State and as a citizen of the United States, but the rights secured to him by the State are different from those secured by the United States. For the protection of his rights, he must look to that government from which the particular right of which he may be deprived is derived.

Slaughter House Cases, 16 Wall., 74.
United States v. *Cruikshank*, 92 U. S., 542.

The Fourteenth Amendment to the Constitution of the United States recognized, if it did not create, a National citizenship, as distinguished from that of the States. See dissenting opinion of Mr. Justice Field in *Ex Parte Commonwealth of Virginia*, 100 U. S., 339.

In order to remove any uncertainty that had always existed as to whether there is a citizenship of the United States, and in order to define that citizenship, as well as to declare what constitutes citizenship of a State, Clause 1 of Section 1 of the Fourteenth Amendment provides:

> "All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States, and of the State wherein they reside".

In considering this clause of the Amendment, Mr. Justice Miller, in the majority opinion in the *Slaughter House Cases*, 16 Wall., 36, says:

> "The distinction between citizenship of the United States and citizenship of a State is clearly recognized and established. Not

only may a man be a citizen of the United States without being a citizen of a State, but an important element is necessary to convert the former into the latter. He must reside within the state to make him a citizen of it, but it is only necessary that he be born or naturalized in the United States to be a citizen of the Union.

It is quite clear, then, that there is a citizenship of the United States and a citizenship of a State, which are distinct from each other, and which depend upon different characteristics or circumstances in the individual.

We think this distinction and its explicit recognition in this Amendment of great weight in this argument, because the next paragraph of the same section, which is the one mainly relied on by the plaintiffs in error, speaks only of privileges and immunities of citizens of the United States, and does not speak of those of citizens of the several States. The argument, however, in favor of the plaintiffs, rests wholly on the assumption that the citizenship is the same and the privileges and immunities guaranteed by the clause are the same.

* * * * * * * * * * * *

Of the privileges and immunities of the citizens of the United States, and of the privileges and immunities of the citizen of the State, and what they respectively are, we will presently consider; but we wish to state here that it is only the former which are placed by this clause under the protection of the Federal Constitution, and that the latter, whatever they may be, are not intended to have any additional protection by this paragraph of the Amendment.

> If, then, there is a difference between the privileges and immunities belonging to a citizen of the United States as such, and those belonging to the citizen of the State as such, the latter must rest for their security and protection where they have heretofore rested; for they are not embraced by this paragraph of the Amendment".

We respectfully submit that the term "citizen", as used in the Constitution and laws of the United States and in Section 19 of the Criminal Code, includes all persons born or naturalized in the United States, men, women and children, and means membership in the body of people composing this Nation, and nothing more.

Just as this Court has said that the distinction between a citizen of a State and a citizen of the United States was important in the *Slaughter House Cases*, so, we submit, the distinction here is important, on account of the fact that in the brief filed on behalf of the Government, it is argued that the offense alleged against the defendants is an interference with the rights of citizens of the United States in respect to a right secured to them as citizens of the United States.

On behalf of the defendants, we respectfully submit that Section 19 of the Criminal Code protects only citizens of the United States as such, and as to rights exclusively guaranteed to them under the Constitution and laws of the United States; that the statute does not apply to offenses such as are alleged in the indictment, for the reason that whatever rights the candidates for the nomination for the of-

fice of Senator in the Congress of the United States from the State of West Virginia had in the primary election held in the State of West Virginia on the 6th day of June, 1916, were derived solely from the State of West Virginia, and accrued to them under and by virtue of the fact that they were citizens of the State of West Virginia, as distinguished from citizens of the United States, and that the offenses as charged, if any such were committed, were offenses against the State of West Virginia and its citizens, and not against the United States, as a sovereign government, or against any right of its citizens guaranteed to them under its Constitution and laws.

Minor v. *Happersett*, 88 U. S., 162; 21 Wall., 178.

RIGHTS OF CITIZENS OF THE UNITED STATES.

What is the character of the rights and privileges of citizens of the United States, guaranteed to them by the Constitution and laws of the United States?

The rights and privileges secured to citizens by the Constitution of the United States are the rights and privileges, and only such rights and privileges, as are common to all persons as members of society constituting the great body of citizens of the United States. They are designated "civil rights", as distinguished from "political rights".

Minor v. *Happersett*, 88 U. S., 162; 21 Wall., 178.

Such civil rights are absolute and personal. They can never be withheld, under the Constitution of the United States, and may always be judicially enforced. They are the fundamental rights which belong to the citizens of every free government, subject only to such just restrictions as may be prescribed for the general good.

Slaughter House Cases, 16 Wall., 36.

RIGHTS OF CITIZENS OF A STATE.

While the individual rights secured to the citizens of the United States are of vast importance, they are comparatively few, and the greater part of the citizenship rights which an individual enjoys have their origin in the State, and are guaranteed and secured to him by the State governments, to which governments the individual citizen must look for the enforcement thereof.

The character of these State secured citizenship rights have been the frequent subject of judicial determination.

In speaking of the rights and immunities of the citizens of the several States, Mr. Justice Washington, in *Corfield* v. *Coryell*, 4 Wash. (C. C.), 371, Fed. Case No. 3230, says:

> "The inquiry is: What are the privileges and immunities of the citizens of the several states? We feel no hesitation in confining these expressions to those privileges and immunities which are fundamental; which belong of right to the citizens of all

free governments, and which have at all times been enjoyed by citizens of the several states which compose this union, from the time of their becoming free, independent and sovereign. What these fundamental principles are it would be more tedious than difficult to enumerate. They may all, however, be comprehended under the following general heads: protection by the government, with the right to acquire and possess property of every kind, and to pursue and obtain happiness and safety, subject, nevertheless, to such restraints as the government may prescribe for the general good of the whole."

Quoted with approval in *Hodges* v. *United States*, 203 U. S., 15, 51 L. Ed., 68.

This Court has said in the *Slaughter House Cases*, 16 Wall., 36, 76, 21 L. Ed., 394-408, that:

"It would be the vainest show of learning to attempt to prove by citations of authority that up to the adoption of the recent Amendments, no claim or pretense was set up that those rights depended on the Federal Government for their existence or protection, beyond the very few express limitations which the Federal Constitution imposed upon the States—such, for instance, as the prohibition against *ex post facto* laws, bills of attainder, and laws impairing the obligation of contracts. But with the exception of these and a few other restrictions, the entire domain of the privileges and immunities of citizens of the States, as above defined, lay within the constitutional and legislative power of the States, and without that of the Federal Government".

ONLY LEGAL RIGHTS CAN BE JUDICIALLY ENFORCED.

In order to support a conviction, the right thus asserted must necessarily be a legal right, as distinguished from a moral obligation, for only legal rights can be enforced under the Constitution and laws of the United States.

In the case of *United States* v. *Patrick*, 54 Fed., 339, at page 348, the court, in speaking of the meaning of the word "right", as used in section 5508, now Section 19 of the Criminal Code, says:

> "The words 'rights' or 'privileges' have, of course, a variety of meanings, according to the connection or context in which they are used. Their definition, as given by standard lexicographers, include 'legal power', 'authority', 'immunity granted by authority', 'investure with special or particular rights'. In this enlarged sense they are used in Sec. 5508 with the qualification that the right or privilege must be one derived from or secured by the Constitution or laws of the United States to the citizens engaged in its exercise or enjoyment".

FEDERAL RIGHTS MUST BE GRANTED BY CONSTITUTION.

Furthermore, this right must be such as is expressly or by necessary implication granted to a citizen by the Constitution of the United States, for no citizen enjoys any right within the protective power of Congress except such as have been expressly guar-

anteed to him by the Federal Constitution, all rights not so granted being secured to him by the State, and the power to protect such rights being vested in the State exclusively.

United States v. *Cruikshank*, 92 U. S., 542.

CONGRESS MUST LEGISLATE.

Congress must first act before a constitutional right of a citizen can be judicially recognized and enforced. This is so for the reason that the United States has no common law.

United States v. *Worral*, 2 Dallas, 385;
Wheaton v. *Peters*, 8 Peters, 591;
United States v. *Reeves*, 92 U. S., 218;
United States v. *Eaton*, 144 U. S., 677.

> "The legislative authority of the Union must first make an act a crime, affix a punishment to it, and declare the court that shall have jurisdiction of the offense."

> "If Congress has not declared an act done within a State to be a crime against the United States, the courts have no power to treat it as such."

United States v. *Hudson*, 7 Cranch., 32.

Section 5508 was invoked and relied upon in the case of *United States* v. *Waddell*, 112 U. S., 76, which was a case arising under Section 3 of Article 4 of the Constitution, which provides that:

> "Congress shall have power to make all needful rules and regulations respecting the territory and property of the United States."

The indictment in that case alleged that the defendants had conspired to defraud a citizen of the United States of his rights in regard to public lands. In sustaining the demurrer to the indictment, the Court said:

> "The right assailed, obstructed, and its exercise prevented, or attempted to be prevented, as set out in this petition, is very clearly a right wholly dependent upon the Act of Congress concerning the settlement and sale of the public lands of the United States. No such right exists or can exist outside of an act of Congress."

This principle has been applied in the following cases:

Wilson v. *Blackbird Creek Marsh Co.*, 2 Peters, 245;
Cooley v. *Board of Wardens*, 12 How., 299;
State of Pennsylvania v. *Wheeling Bridge Company*, 13 How., 518;
Manchester v. *Commonwealth of Massachusetts*, 139 U. S., 240.

The controlling principle in all of these cases is that notwithstanding the fact that the United States had rights in the subject matter, with full authority to assert the same, still it could not do so because Congress had not conferred such authority upon the Federal Courts.

We, therefore, conclude that the United States does not possess any enforcible rights in respect to the election of a United States Senator, or, indeed, as to the conduct of elections in any respect, by virtue of the Federal Constitution itself, but the right of the United States to control elections in a State is dependent wholly upon the acts of Congress under the Constitution.

And Congress has not acted so far as this case is concerned, because the primary complained of was held under the West Virginia Act, and, at that time (June 6, 1916), the Act of Congress of June 4, 1914, had ceased, by its own terms, to be operative in the State of West Virginia.

This leads us to a consideration of the Constitution and laws of the United States, and of the State of West Virginia, in respect to the elective franchise, and particularly in regard to the nomination and election of United States Senators, with a view of finding out, if possible, whether the Federal Courts have jurisdiction to punish for the offenses alleged in this indictment.

FEDERAL CONSTITUTIONAL PROVISIONS AS TO THE ELECTION OF SENATORS.

> "The times, places and manner of holding elections for senators and representatives shall be prescribed in each state by the legislature thereof; but the Congress may, at any time, by law, make or alter such regulations except as to the places of choosing senators".—Section 4, Article 1, of the Constitution of the United States.

"Each House shall be the judge of the election, returns and qualifications of its own members".—Section 5, Article 1 of the Constitution of the United States.

"The Senate of the United States shall be composed of two Senators from each State, elected by the people thereof, for six years; and each Senator shall have one vote. The electors in each state shall have the qualifications requisite for electors for the most numerous branch of the state legislatures. When vacancies happen in the representation of any state in the Senate, the executive authority of such state shall issue writs of election to fill such vacancies: Provided, that the legislature of any state may empower the executive thereof to make temporary appointment until the people fill the vacancies by election as the legislature may direct. This amendment shall not be so construed as to affect the election or term of any Senator chosen before it becomes valid as part of the Constitution".—Seventeenth Amendment to the Constitution of the United States.

FEDERAL STATUTES AS TO THE ELECTION OF SENATORS.

Following the adoption of the Seventeenth Amendment to the Constitution of the United States, Congress on June 4th, 1914, passed "An Act Providing a Temporary Method of Conducting the nomination and election of United States Senators", as follows:

"Sec. 1. That at the regular election held in any State next preceding the expiration of the term for which any Senator was elected to represent such State in Congress, at which election a Representative in Congress is regularly by law to be chosen, a United States Senator from said State shall be elected by the people thereof for the term commencing on the fourth day of March next thereafter.

Section 2. That in any State wherein a United States Senator is hereafter to be elected either at a general election or at any special election called by the executive authority thereof to fill a vacancy, until or unless otherwise specially provided by the legislature thereof, the nomination of candidates for such office not heretofore made shall be made, the election to fill the same conducted, and the result thereof determined, as near as may be, in accordance with the laws of such State regulating the nomination of candidates for and election of Members at Large of the National House of Representatives: Provided, That in case no provision is made in any State for the nomination or election of Representatives at Large, the procedure shall be in accordance with the laws of such State respecting the ordinary executive and administrative officers thereof who are elected by the vote of the people of the entire State: And provided further, That in any case the candidate for Senator receiving the highest number of votes shall be deemed elected.

Sec. 3. That section two of this Act shall expire by limitation at the end of three years from the date of its approval."

WEST VIRGINIA CONSTITUTIONAL PROVISIONS AS TO ELECTIONS.

> "The Legislature shall prescribe the manner of conducting and making returns of elections, and of determining contested elections; and shall pass such laws as may be necessary and proper to prevent intimidation, disorder or violence at the polls, and corruption or fraud in voting, counting the vote, ascertaining or declaring the result, or fraud in any manner, upon the ballot".—Article 4, Section 11, Constitution of West Virginia.

WEST VIRGINIA ELECTION STATUTES.

Pursuant to the foregoing provision of the Constitution of the State of West Virginia, the Legislature thereof has from time to time enacted numerous statutes in regard to the conduct of elections, and prescribing penalties for offenses thereagainst.

At the time of the enactment by Congress of the statute of June 4th, 1914, West Virginia did not have any statute providing for the election of Congressmen at large, but a method was provided for the nomination of candidates for the office of Senator in the Congress of the United States by "An Act providing for the nomination of candidates for public office, including United States Senators", etc., passed February 20, 1915, approved by the Governor on March 4, 1915, and in effect ninety days from its passage, by which it was provided:

> "All candidates of political parties to be voted for by the people (except candidates

> for judges of the supreme court of appeals, candidates for judge of the circuit court, and candidates for judge of the criminal or intermediate court, and such candidates as are to be voted for at special election to fill vacancies, presidential candidates and electors, and candidates for offices to be filled by cities, towns or villages of less than five thousand inhabitants) shall be nominated at a direct primary election, held in accordance with this act".
>
> W. Va. Acts 1915, p. 225.

This primary election law adopted all provisions of Chapters 3 and 5 of the Code of West Virginia, being said chapters governing "Elections" and "Corrupt Practices", respectively, in so far as the same are not in conflict with and are not modified by the primary election law, as appears from Section 26a-(24) of Chapter 3, of the Code of West Virginia, as follows:

> "All provisions of chapters three and five of the Code of West Virginia, so far as the same are not in conflict with and are not modified by this Act, shall, so far as they are germane, apply to and are hereby made applicable to the primary elections".

Notwithstanding the provisions above quoted in regard to offenses in elections and providing for the punishment of corrupt practices, the Legislature adopted as a part of the primary election law itself a section dealing with offenses in primary elections, which reads as follows:

"Any primary election officer, members of any political committee or other person, who shall wilfully fail and neglect to perform any duty by this act required of him, or who shall tamper with, change or destroy any ballot, return or certificate of election, or delay the return of ballot boxes, ballots and other election returns to the county clerk, or wilfully do any other act, the object of which is to destroy any ballot, or the record of any canvass of votes, or in any way wilfully interfere with the utmost honesty and fairness in conducting any such primary election, or in making nominations thereat, and any voter who shall cast more than one primary election ballot on the same day, or who shall vote under a name other than that by which he is generally known, who shall make any false oath, affirmation or affidavit respecting the right of himself or any other person to vote, shall be guilty of a felony, and upon conviction thereof, shall be confined in the penitentiary not less than one year or more than three years."

W. Va. Acts, 1915, Chap. 26, Sec. 25.

STATE CONTROL OF ELECTIONS.

From a consideration of the Federal Constitutional provisions in regard to the election of Representatives and Senators it appears that the framers of the Constitution of the United States provided for State regulation of elections, subject to the ultimate control of the Federal Government, wherever federal rights are involved. Consequently, elections were left to the control of the State governments "as being best acquainted with the situation of the peo-

ple, subject to the control of the general government, in order to enable it to produce uniformity and prevent its own dissolution." Madison, Argument before Virginia Convention, 3 Ferrand's Records of the Federal Conventions, pages 311-312.

Alexander Hamilton, writing in the "Federalist" concerning elections, said:

> "It will not be alleged that an election law could have been framed and inserted in the constitution which would have been applicable to every probable change in the situation of the country; and it will, therefore, not be denied that a discretionary power over elections ought to exist somewhere. It will, I presume, be as readily conceded that there were only three ways in which this power could have been reasonably organized; that it must either have been lodged wholly in the national legislature, or wholly in the state legislatures, or primarily in the latter, and ultimately in the former. The last mode has with reason been preferred by the convention. They have submitted the regulation of elections for the federal government, in the first instance, to the local administrations; which in ordinary cases, and when no improper views prevail, may be both more convenient and more satisfactory; but they have reserved to the national authority a right to interpose, whenever extraordinary circumstances might render that interposition necessary to its safety".— "Federalist", Essay No. LIX, page 320.

FEDERAL POLICY ONE OF NON-INTERFERENCE AS TO ELECTIONS.

It is interesting to recall that notwithstanding the fact that Congress had full power under the Constitution to legislate in regard to Congressional elections, it was not until the year 1842 that any law was passed on this subject, at which time it was provided that representatives should be elected by Districts, and, subsequently, it was provided that all elections for representatives should be held on the same day.

Following the Civil War and the adoption of the Thirteenth, Fourteenth and Fifteenth Amendments to the Constitution, and for the purpose of governing the conditions arising on account thereof, Congress dealt fully and explicitly with the subject of the elective franchise by the Act of May 31st, 1870. The statutes then enacted appear as Chapter 7 of the Revised Statutes, which is headed: "Crimes against the Elective Franchise and Civil Rights of Citizens". Ten of the sections dealt explicitly with elections, all of which were expressly repealed by the Act of February 8th, 1894. Section 5508, now Section 19 of the Criminal Code, was not repealed, and the defendants in the case at bar are charged with a violation thereof.

In 1910 Congress passed a "Corrupt Practices Act".

Following the adoption of the Seventeenth Amendment to the Constitution of the United States, Congress, on June 4th, 1914, passed "An Act Providing a temporary method of conducting the nominations and elections of United States Senators".

This is the last Federal enactment in regard to

the selection of United States Senators, and this Act was temporary, and, by its own terms, had ceased to be operative in the State of West Virginia at the date of the primary complained of.

Such is the brief record of Federal legislation as to elections, and it shows a policy of practical non-interference on the part of the United States with State control.

JUDICIAL INTERPRETATION.

With the constitutional provisions and the statutes before us, we are now in position to examine their interpretation and application by the courts as respects the matter in hand.

RIGHT TO VOTE NOT A NATURAL BUT A GRANTED RIGHT.

The right of a citizen to vote is not a natural right, but is one that is bestowed upon the citizen by some constituted authority.

RIGHT TO VOTE DERIVED FROM STATE.

The right to vote is a privilege derived from the State and not from the Federal Government.

United States v. *Reeves*, 92 U. S., 214, 23 L. Ed., 563;
United States v. *Cruikshank*, 92 U. S., 542; 23 L. Ed., 588.

THE UNITED STATES DOES NOT HAVE ANY VOTERS OF ITS OWN.

The Constitution of the United States does not confer the right of suffrage upon any one, nor does the United States have any voters of its own creation in the States.

Minor v. *Happersett*, 21 Wall., 178.

The right of suffrage is not even a necessary attribute of Federal citizenship.

United States v. *Cruikshank*, supra.

VOTERS NEED NOT BE CITIZENS OF UNITED STATES.

On the other hand, it is not necessary that the voters under State laws, even at elections for Presidential electors and members of Congress, shall be citizens of the United States. Under certain prescribed conditions, citizens of the State, but not of the United States, may vote for State and Federal officers in Missouri, Alabama, Arkansas, Florida, Georgia, Indiana, Kansas, Minnesota, and Texas, and, perhaps, in other States.

Minor v. *Happersett*, 88 U. S., 162.

In *Minor* v. *Happersett*, supra, Chief Justice Waite says:

> "Certainly, if the courts can consider any question settled, this is one. For nearly

ninety years the people have acted upon the idea that the Constitution when it conferred citizenship, did not necessarily confer the right of suffrage. If uniform practice, long continued, can settle the construction of so important an instrument as the Constitution of the United States confessedly is, most certainly it has been done here".

EFFECT OF FOURTEENTH AND FIFTEENTH AMENDMENTS ON ELECTIVE FRANCHISE.

The adoption of the Fourteenth Amendment did not add to the privileges and immunities of citizens of the United States.

Minor v. *Happersett*, supra.

Neither does the Fifteenth Amendment to the Constitution confer any additional rights upon the individual citizen in the exercise of the elective franchise. The inhibition contained in the Fifteenth Amendment is upon the States and not upon the individual, and the power of the Federal Government under said amendment is limited to the enactment of laws to prevent the right of a citizen of the United States to vote to be denied or abridged on account of race, color or condition.

Carem v. United States, 121 Fed., 250.

True, the exercise of the authority thus conferred by the Fifteenth Amendment upon the Federal Government may result in securing to persons

of African descent the right to vote, but this is not because the right to vote was conferred primarily by the Federal Constitution but because the right may be incidentally secured to the individual of African descent on account of the enforcement by the Federal Government of the inhibition upon the States.

In *Guinn* v. *United States*, 238 U. S., 354, 59 L. Ed., 347, Chief Justice White, in speaking of the respective rights of the State and Federal Governments since the adoption of the Fifteenth Amendment, says:

> "Beyond doubt the Amendment does not take away from the state governments in a general sense the power over suffrage which has belonged to those governments from the beginning, and without the possession of which power the whole fabric upon which the division of state and national authority under the Constitution and the organization of both governments rest would be without support, and both the authority of the nation and the state would fall to the ground. In fact, the very command of the Amendment recognizes the possession of the general power by the state, since the Amendment seeks to regulate its exercise as to the particular subject with which it deals * * * * * But while this is true, it is true also that the amendment does not change, modify, or deprive the states of their full power as to suffrage except, of course, as to the subject with which the amendment deals and to the extent that obedience to its command is necessary. Thus the authority over suffrage which the states possess and the limitation which the Amendment imposes

are co-ordinate and one may not destroy the other without bringing about the destruction of both".

ACTS CHARGED WOULD NOT HAVE CONSTITUTED AN OFFENSE EVEN AT A GENERAL ELECTION.

We therefore conclude, from a consideration of the foregoing authorities, that even though the offenses charged had been committed at a general election at which a Senator in the Congress of the United States was chosen, such acts would not have constituted an offense against the Federal law such as gives to United States courts jurisdiction to enforce the pains and penalties, and the demurrer would have been properly sustained under the circumstances just stated. But the facts just supposed are not the facts in this case. The offenses charged were not committed at a general election where a Senator of the United States was actually chosen, but at a West Virginia state primary election.

We will, therfore, in the next place call the Court's attention to the West Virginia primary law for the purpose of finding out, if possible, what it is, what is its origin and purpose, by what authority established, to what and to whom does it apply, and what are the results accomplished by it, all for the purpose of finding out whether the rights secured to citizens of the State of West Virginia, and of the United States under this law are such rights as are guaranteed to them under the Constitution and laws of the United States.

THE WEST VIRGINIA PRIMARY ELECTION LAW.

The West Virginia Primary Election Law, enacted as recently as 1915, is a mere nominating device for determining party candidates to be subsequently voted for at a general election. It does not give an opportunity for all political parties in the State to participate therein, does not extend to all citizens duly qualified to exercise the elective franchise an opportunity to vote thereat, and is not the sole and exclusive method by which candidates for public office may have their names placed on the ballot to be voted for at a general election.

The following is the provision of the statute in respect to the political parties which may participate:

> "A political party shall be taken to be an affiliation of electors representing a political party or organization which, at the last preceding general election, polled for its candidates for representative in Congress in the several districts at least five per cent of the vote cast for that office in the State".—Chapter 26, Acts West Virginia Legislature, Session 1915, Section 1, Clause 2.

The effect of this provision at the State-wide primary held on June 6th, 1916, was to limit the class of citizens participating in said election to members of the Republican and Democratic parties, to the exclusion of all other political parties. Among the parties so excluded were the Prohibition Party, the Socialist Party, and perhaps others.

Not only are members of political parties prevented from participating in the primary election, but those citizens of the United States who are legally qualified voters under the laws of the United States who do not affiliate with any political party and refuse to swear allegiance to any party, are prohibited from voting at the primary election. Every voter, before casting his ballot, is required by oath or affirmation, to declare that he is a regular and qualified member and voter of a party, as appears from the following:

> "On entering the election room, the voter shall announce his name, and if he is duly registered, or has obtained transfer, as provided by law, he shall sign his name and place of residence in a book of the party whose ballot he wishes to cast, which book shall be paged alphabetically, and have at the top of the page thereof in form and effect the following oath or affirmation with blank spaces properly filled in as to the party and precinct as indicated: 'The undersigned do each for himself severally swear or affirm that I am a regular and qualified member and voter of the_____ party, and am a duly qualified resident and voter in precinct No._____, _____ District, _____ County, West Virginia, and reside at the place designated opposite my name signed hereunder; that the one ballot which I am about to cast will be the only primary election ballot cast this day by me; that I have neither received, nor do I expect to receive, anything of value for myself or another, given or promised with the manifest intent to influence my vote or

the vote of another or others at this time' ". Chapter 26, Acts West Virginia Legislature, Session 1915, Section 13, Clause 1.

Furthermore, the primary method of making nominations in West Virginia is not the sole and only method by which a candidate may have his name placed on the ballot. The primary election law makes provision for names being placed on the ballot by petition signed by five per cent. of the qualified voters resident within the political division for which a candidate is presented.

> "Candidates for public office may be nominated otherwise than by direct primary election. In such case, a certificate shall be signed by voters resident within the state, district, or political division for which the candidate is presented, to a number equal to five per cent. of the entire vote cast at the last preceding election in the state, circuit, district, county or other division for which the nomination is made. No voter signing such certificate shall be counted unless his residence and postoffice address be designated. Such certificates shall state the name and residence of each of such candidates; that he is legally qualified to hold such office; that the subscribers desire and are legally qualified to vote for such candidates; and may designate, by not more than five words, a brief name of the party or principle which said candidates represent. No person shall be legally qualified to sign such a certificate who participated in a direct primary election held in accordance with this act. Every person not legally qualified to sign such a certificate and who subscribes

his name to the same shall be guilty of a misdemeanor and fined not less than ten dollars nor more than fifty dollars, and a justice of the peace shall have jurisdiction in such case". Chapter 26, Acts West Virginia Legislature, Session 1915, Section 23, Clause 2.

THE RIGHT TO BE VOTED FOR AT A WEST VIRGINIA PRIMARY ELECTION FOR PARTY NOMINATION FOR SENATOR IN THE CONGRESS OF THE UNITED STATES IS NOT A RIGHT GUARANTED UNDER THE CONSTITUTION OR LAWS OF THE UNITED STATES.

A State primary election is not such an election as is referred to in the Constitution and laws of the United States in respect to the election of United States Senators, and is not within the meaning of the term "election", as used in the Federal Constitution and in the Acts of Congress. *Elliott* v. *Thompson et al.*, United States District Court for the Western Division of the Western District of Missouri, at Kansas City, W. F. Booth, Judge, opinion filed, but not officially reported. Printed as Appendix to Brief for the United States filed herein.

The great weight of authority in the decisions of the State courts is that a primary election is not an election within the meaning of the term as used in the State laws and Constitutions.

State ex rel. Taylor, 220 Mo., 619;
State v. *Nichols*, 50 Wash., 508;
Ledgerwood v. *Pitts*, 122 Tenn., 570;

State v. *Johnson*, 87 Minn., 152;
State v. *Erickson*, 119 Minn., 152;
Brown v. *Smallwood*, (Minn.) 153 N. W., 953;
Montgomery v. *Chelf*, 118 Ky., 766;
Gray v. *Seitz*, 162 Ind., 1.

In the case of **State** v. **Erickson**, 119 Minn., 152, it is said:

> "Our primary election, which is purely of statutory origin, is the selection, by qualified voters, of candidates for the respective offices to be filled, while an election, which has its origin in the Constitution, is the selection, by such voters, of officers to discharge the duties of the respective offices."

The Court, in the case of **State** v. **Johnson**, 87 Minn., 152, said:

> "The primary election law simply adopts a general method by which all parties and organizations shall, in the interests of public order upon a certain day, within certain regulations meet, and select their various nominees to go upon the ballot for the ensuing election".

Judge Booth, in the case of *Elliott* v. *Thompson*, *supra*, says:

> "The rights of candidates and voters at primary elections are widely different from the rights of candidates and voters at an election proper. Legislation on various points may be passed with reference to

rights and procedure under a primary election which would be unconstitutional if applied to an election proper. The right at a primary is not a right to vote to elect, but a right to vote to nominate. In other words, the primary is a mere nominating device".

The case of *Elliott* v. *Thompson*, *supra*, was an application by the plaintiff for a **dedimus potestatem** to take depositions as provided by Sec. 866, R. S. U. S.

The application was opposed on the grounds that the court did not have jurisdiction of the action and that the ground of complaint did not state a cause of action, and because the granting of it would be contrary to the provisions of the Constitution and statutes of the State of Missouri.

The action was brought by a citizen of the State of Missouri against certain defendants, also citizens of that State, for damages alleged to have been sustained by reason of a conspiracy on the part of all the defendants, and by reason, pursuant thereto, of the refusal by several of the defendants, acting as judges and clerks of a certain primary election held in the city of Kansas City, State of Missouri, on the 4th day of August, 1914, to count the vote of the plaintiff as cast by him for a member of Congress.

It was asserted that the Federal Court had jurisdiction on the ground that the action was one arising under the Constitution and laws of the United States, the complainant alleging, "that said defendants herein did procure and cause the plaintiff to be deprived of a right and privilege secured to him by the Constitution and laws of the United States of voting for a member of Congress for the fifth co[n]

gressional district".

In denying the application, Judge Booth said:

> "The weakness of the plaintiff's contention lies in the assumption that a nominating convention or a primary election is a necessary step in the election of a representative in Congress. It is a very common step, and a convenient step, but not a necessary step.
>
> A primary election not being a necessary step in the election of a representative in Congress, cannot be held to be included by fair implication in the meaning of the term 'election', as used in the Constitution of the United States touching the election of representatives in Congress.
>
> Whether it might be desirable for Congress to fully recognize and adopt the States' primary elections and the laws relating thereto so far as they relate to the nominations of representatives in Congress, and to provide for the protection and enforcement of the rights of voters at such primary elections, is a question which the courts are not called upon to decide. It is sufficient to say that as yet Congress has not specifically done so, and in my opinion, it has not done so by implication.
>
> Before the court can grant the present application of the plaintiff it must decide that it has jurisdiction of the case on the ground that the action is one arising under the Constitution or Laws of the United States. In my opinion, the action does not so arise, either directly, or by fair implication. Therefore, I am constrained to hold that this Court has not jurisdiction of the

action, and it necessarily follows that the present application must be denied."

The same reasoning which has led State courts almost universally to hold that State primaries are not elections within the meaning of the State constitutions, leads inevitably to the conclusion that a State primary election is not such an election as is contemplated by the Constitution of the United States when speaking of the election of United States Senators.

Furthermore, the right to be a candidate for Senator at a State primary election is not such a right as is guaranteed by the Constitution or laws of the United States, because a candidate is not deprived by any act in respect to a primary election of being a candidate before the people for the election to the office of United States Senator. We have found that the primary law of the State of West Virginia expressly provides a method by which citizens may become candidates for Senator, other than by means of entering a primary election for a nomination to that office. Consequently, if one is deprived of his right in the primary election on account of fraud, he still has his right to become a candidate before the people for the office of United States Senator.

And how can it be that depriving citizens of nominations at primary elections is any more in violation of the Constitution and laws of the United States when done by private individuals than it is when done by the State of West Virginia? It must be that the State has authority by virtue of its sover-

eignty to regulate and control exclusively primary elections.

FEDERAL CORRUPT PRACTICES ACT OF 1911.

It is submitted on behalf of the Government that Congress has adopted State laws in respect to primary elections for the reason that by the Act limiting the amount of campaign expenses in elections to offices of Representative and Senator in the Congress of the United States, passed August 19th, 1911, Chapter 32, United States Compiled Statutes, 1913, sec. 195, Congress recognized primary elections.

The recognition of primary elections under this Act was likewise extended in the same form to nominating conventions. Surely it cannot be successfully contended that by recognizing political nominating conventions for candidates for Congress, Congress ever intended to adopt, or did adopt, as a matter of fact, all state laws pertaining to nominating conventions. If it did not do so by virtue of the Act of August, 1911, neither did it do so as respects primary elections, for both conventions and primary elections stand on the same footing in so far as congressional recognition is concerned.

We respectfully submit that it takes something more than a mere reference in an Act of Congress to a State election in order to make the election laws of the State governing such elections the laws of the United States. That is going too far, we submit, and, furthermore, farther than any Federal Court has ever gone.

In the case of *Anthony* v. *Burrow*, 129 Fed., 783,

in referring to the *Yarborough* case and other cases to the same effect, Judge Pollock said:

> "From this it will be seen the claim made by solicitors for complainant, that the above and kindred cases hold the election machinery employed by the state in the selection of candidates for the office of representative in Congress, becomes, when so employed, a part of the Federal law, and the construction of the same raises a Federal question, is claiming too much for such cases".

FEDERAL ACT OF JUNE 4TH, 1914.

It is argued on behalf of the Government that Congress, since the adoption of the Seventeenth Amendment to the Constitution of the United States, has adopted as its own the election laws of the State of West Virginia, including those State laws relating to the conduct of primaries, by the Act of June 4, 1914, Chapter 103, and has thus made the election laws of the State of West Virginia, in so far as they relate to the choosing of a United States Senator, Federal laws, under the authority of *In re Co*, 127 U. S., 731. *Ex Parte Siebold*, 101 U. S., 371; *Ex Parte Yarborough*, 110 U. S., 651.

At the time the statute of June 4th, 1914, was enacted, West Virginia did not have any laws regulating the nominations of candidates for the election as members at large of the National House of Representatives. Consequently, the Act, if it applied to West Virginia at all, fixed the method of choosing candidates for Senator the same as that for the sel-

ection of ordinary executive and administrative officers of the State, but, under the express terms of the Act, this method should continue only until otherwise specially provided by the State Legislature. The Act was a temporary one, passed to meet an emergency arising by reason of the fact that the States had had no opportunity to legislate in respect to the choosing of United States Senators by a direct vote of the people. This is indicated by the title, which designates it as providing a "temporary method", and also by Section 3 of the Act, which provides that it shall expire by limitation at the end of three years.

However, this condition did not long exist, for the Legislature of West Virginia acted promptly, and passed an act providing for the nomination of candidates for public office, including candidates for United States Senator; which act was passed February 20th, 1915, approved by the Governor March 4th, 1915, and in effect ninety days from passage.

It thus appears that, as far as West Virginia is concerned, the Federal Act of June 4th, 1914, ceased and no longer continued to apply after June, 1915. The State law automatically became the only statute on the subject of the nomination and election of United States Senators, and from thenceforth the Federal Act of June 4th, 1914, providing a temporary method for the nomination and election of United States Senators is without force and effect in the State of West Virginia.

We respectfully submit that the Federal Government, by the enactment of the Seventeenth Amendment to the Constitution of the United States, pro-

viding for the election of two United States Senators from each State by the people thereof, and by the subsequent enactment by Congress, on June 4th, 1914, of a temporary method of conducting the nomination and election of United States Senators, never intended to exercise direct authority and control over either the nomination or election of United States Senators except "until and unless otherwise specially provided by the Legislature thereof". When the Legislature of the State of West Virginia provided for the nomination and election of United States Senators, the statute of June 4th, 1914, ceased to apply to West Virginia by virtue of its own express provisions, just as effectively as the statute will cease of its own limitation to apply to any of the States after June 4th, 1917.

It should be noted that the method of selecting candidates at primary elections to be subsequently voted for at a general election is comparatively new in this country. The method is even now only slowly making its way against what was formerly the sole method of selecting candidates, namely, the party convention, or the party caucus. It is by no means a proved success, and has not won for itself permanent and universal popular favor. Signs point to its being supplanted by some other method just as it has now in some measure taken the place of party conventions for the nomination of candidates.

When the Constitution of the United States was adopted, the method of choosing candidates by means of primary elections was unheard of. The same was true even in 1870 when the statute relied on became a law. How then, can it be said that the Constitution, the basis for all election rights that can be suc-

cessfully asserted under Federal authority, secured the right of a candidate for nomination by the primary method, or that the statute invoked contemplated the protection of any such right? Surely it cannot be successfully contended that the framers of the Constitution, looking into the future a hundred years, or that the law-makers of 1870, contemplating the conditions that would arise in the early part of the twentieth century, foresaw that the method of nomination by primary election would come into vogue, and then and there guaranteed citizens of the United States certain rights in respect to such primary elections, and authorized the courts of the United States to administer punishment for conspiring to defraud citizens of their rights under said election laws, where the election of Federal officers is involved.

THE INDICTMENT IS WITHOUT PRECEDENT

The indictment in this case is without the support of judicial precedent. This is practically admitted, as we understand it, in the brief on behalf of the Government, at page 26.

This case does not fall within the principles of such cases as *Ex parte Yarborough*, 110 U. S., 651; *United States* v. *Mosely*, 238 U. S., 383; and *United States* v. *Aczel*, 210 Fed., 917.

In so far as the rights of the defendants in this case are concerned it may be conceded that every legal voter in the Unitetd States is protected by Federal authority in his right to cast his ballot at a regula relecton for the candidates of his choice; that the United States not only secures to him the right to

vote, without let or hindrance, but further, secures to him a fair and honest counting and certification of his ballot, as cast. But when that is done, the extreme limit of the exercise of Federal authority over elections, as determined in and by the courts of the United States under the Constitution and Congressional enactments has been reached. No court that has ever been called upon to interpret the Federal Constitution or Federal statutes in respect to elections has ever gone further than to recognize and uphold the right of every legal voter to vote and to have his ballot counted and returned as cast at all general elections where Federal officers are chosen.

But no such right of a citizen is involved in this case. No violation of any citizenship right is asserted. The indictment does not even deal with a general election. Its subject matter relates to a State primary election held exclusively under State laws, and for the sole purpose of securing to certain successful candidates in said primary the endorsement of a political party,—in this case, the endorsement of the Republican Party, of a candidate for the office of United States Senator to be voted for as a party candidate at a general election to be subsequently held.

In the *Aczel* case, *supra*, the District Court held that since the adoption of the Seventeenth Amendment to the Constitution of the United States, the right to vote for a United States Senator is a right secured by the Constitution and laws of the United States. This decision is based upon the fact that the Act of Congress of June 4th, 1914, adopted, for the election of Senators, the laws of the State of Indiana, which laws provide for election inspectors, judges

and pole clerks, and prescribe their duties, and, therefore, the State laws became, in effect, the Federal laws as to the election of United States Senators.

We have seen that the Act of June 4th, 1914, adopted, for the election of Senators, the laws of the several States only in cases where a State had not already legislated on the subject, and where there had not already been legislation, the State laws were adopted only until the Legislature of such State could act and adopt laws of its own for the election of United States Senators.

We have further seen that the Legislature of West Virginia adopted a method for the nomination and election of United States Senators, which was in force and effect at the time of the alleged illegal acts of the defendants. Consequently, the State law became the sole law governing the primary election held in the State of West Virginia on June 6th, 1916. Whatever rights candidates voted for at that election had were secured to them solely by the State law, and could be enforced, if at all, only in the State courts.

But the facts charged in the *Aczel* case were altogether different from those alleged in the case at bar. In the *Aczel* case, the defendants were charged with conspiring to injure, oppress and threaten certain citizens of the United States in the free exercise and enjoyment of the right and privilege of voting at a general election for a candidate for United States Senator from the State of Indiana, and for a candidate for Representative in Congress from the Fifth Congressional District of the State of Indiana by the use of threats, and intimidation by the use of pistols and other fire-arms and by means of the fraudulent manipulation of voting machines. This was at a

general election.

The case at bar deals solely with a State primary election held for the purpose of nominating party candidates for political offices to be voted for at a subsequent general election. This is the all-controlling distinguishing fact between this case and the *Aczel* case, as well as all other cases cited in support of the Government's contention herein.

THE DECISIONS SUPPORT THE SUSTAINING OF THE DEMURRER.

On the other hand, the position of the defendants as argued for herein is directly supported by all the decisions on the special point involved that we have been able to find. The only decisions of the Federal courts directly on the question of Federal authority in State primary elections is that of *Elliott* v. *Thompson*, by Judge Wilbur F. Booth of the Western Division of the Western District of Missouri, unreported, but printed as an Appendix to the brief filed on behalf of the Government herein, and the one of Judge Woods in the instant case 236 Federal, 993, in both of which cases the lower courts have denied the authority of the Federal Government under existing laws as to the control of State primary elections.

We submit that the reasoning of Judge Booth and of Judge Woods in their respective opinions, is clear and convincing. It is argued, however, on behalf of the Government, that these Judges have taken a too restricted view of the subject; that their vision should have been much more extended and comprehensive. Our answer to that is that the courts can take no more extended view of the subject than does

Congress, and that if more comprehensive laws are demanded in order to meet the condition of the times, then it is the duty of Congress to act and not of the courts.

We are told in the Government's brief that:

> "Broad principles are to be applied to varying conditions to attain the desired end, let those conditions be as novel or complex as may be (just as in *Commonwealth* v. *Silsbee*, 9 Mass., 473, and *Commonwealth* v. *Hoxey*, 16 Mass., 385, the court applied the common law to frauds and misconduct at town meetings though that law knew nothing of such meetings)".

Since the United States has no common law, we respectfully submit that Congress may act on such broad principles as are argued for in the brief of counsel for the Government, but the Federal courts can only interpret and apply the Constitution and laws of Congress.

COURTS MAY NOT REGULATE PRIMARIES BECAUSE OF THEIR IMPORTANCE.

Moreover, Federal courts may not interpret existing laws so as to extend Federal authority to State primary elections solely because of the fact that primary elections are important and that great interests may be affected by the result of such elections. Whatever may be said of the importance of primary elections may also be asserted of party caucuses and conventions but the Government has never assumed to hold those who participate in party caucuses or

conventions for the nomination of members of Congress and those who participate in legislative caucuses for the nomination of a candidate for Senator of the United States amenable to Federal laws. And yet it could be argued with just as good show of reason that the Federal law should apply to caucuses and nominating conventions as to primary elections.

THE GOVERNMENT HAS THE RIGHT TO HAVE ELECTIONS PURE AND UNTAINTED BY FRAUD.

We are told that the method of choosing Federal officials should not be tainted at its very source. That is fully recognized and admitted by all, and the means of keeping elections pure are directly at hand. The first reliance of the Federal Government is State laws against violation of rights as to the elective franchise. No one can say that the laws of West Virginia are lax in this regard. The Government enjoys the protection of a great bulwark hedged about its citizens by all the States to protect them in their right to vote.

Furthermore, full security is assured the Government as to elections by the reserved power under Section 1 of Article 4 of the Constitution.

But notwithstanding all this protection, more power to the Government is asked at the hands of the Court.

WHAT GOVERNMENT CONTROL OF PRIMARY ELECTIONS WOULD MEAN.

The theory of the Government is that the United

States, through its courts, has control and jurisdiction over a primary election held under and by virtue of the laws of the State of West Virginia; that candidates for Senator of the United States in such primary election are protected under and by virtue of the Constitution of the United States, and further by Acts of Congress, which we have seen can only go to the protection of a right guaranteed a citizen under the Constitution.

It is argued for the Government that the statute of June 4th, 1914, instead of being a very restricted act, as is indicated both by its title and by its limited provisions, is, in fact, a far reaching statute without limitation as to time or as to the Federal authority which it invokes in the matter of elections; that instead of being a single law, it has the force and effect of adopting all the election laws of all the States, as respects primaries, party conventions, caucuses, and general elections, and combines all the election machinery of the several States into one ponderous Federal election machine; invests in the Federal courts the authority to protect every right and privilege guaranteed by any State law in respect to the elective franchis,e and to punish for every violation of every such law, where Federal officials are chosen.

If the Government's contention be true, then this is an enforcement act indeed; far exceeding in its power and scope any law ever passed by Congress in re-construction days, and re-establishes Federal control of elections, which Justice Lamar, as late as 1914, in the dissenting opinion in the case of *United States* v. *Mosely*, 238 U. S., 316, argued had been relinquished in every respect by the repeal in 1894 of

the Federal election laws enacted in 1870 to meet the extraordinary conditions existing at that time.

Should the position of the Government in this case as to the force and effect of Federal election laws be sustained, it would be possible to have a Federal investigation of every election at which a Federal officer was voted for, and the Federal courts would have to hear and determine all matters growing out of such elections.

We do not apprehend that this Court will sustain the Government's position, but will continue to hold, as it has always held, that the primary control of elections is left to the States, subject to the reserved right by the Federal Government to regulate elections at which Federal officers are chosen whenever it is deemed necessary or expedient to do so; and that Coongress has not, as yet,, either directly, or by implication, adopted State primary election laws as, in effect, Federal statutes.

NO. 775.

STATEMENT OF CASE.

No. 775 is an indictment against the same defendants, and involves the same primary election. It is based, however, not upon Sec. 19, but upon Sec. 37 of the Criminal Code, which reads as follows:

"Sec. 37. If two or more persons conspire either to commit any offense against the United States or to defraud the United States in any manner or for any purpose, and one or more of such parties do any act to effect the object of the conspiracy, each of the parties to such conspiracy shall be fined not more than ten thousand dollars, or imprisoned not more than two years, or both."

Crim. Code U. S., Chap. 4, Sec. 37; Rev. Stat., Sec. 5440.

The indictment, after alleging that a general primary election was held on the 6th day of June, 1916, in the State of West Virginia, and under the laws of that State, for the nomination of candidates of political parties to be voted for at the general election to be held in said State on the 7th of November following, at which primary A. B. White, Howard Sutherland, Ben. Rosenbloom and W. F. Hite were opposing candidates for the Republican nomination for the office of United States Senator, charges that the defendants, Edward O'Toole and others, conspired and confederated together "to defraud the United States in the matter of its governmental right to have the candidates of the true choice and preference of said Republican and Democratic parties nominated for said office, and one of them elected and returned to the Senate of the United States, and given the salary lawfully attaching to said office, to the exclusion of all other persons." It then sets forth with more or less detail the alleged overt acts in furtherance of the conspiracy.

The defendants appeared and demurred to this

indictment, and, as grounds of demurrer, among others, assigned the following:

> "1. The United States has no such governmental right as that described in said indictment to be defrauded of.
>
> 2. Neither the Constitution nor laws of the United States recognizes political parties or their nominations, and the United States neither exercises nor enjoys any governmental rights at their hands.
>
> 3 Because the primary statute under which the direct general primary alleged in said indictment was held simply recognizes political partes, and provides the machinery by which the governmental rights of the State may be exercised, and the violation of its rights in that behalf punished; and all governmental rights created by this statute, if any, are bestowed upon the State alone.
>
> 4. Because the matters and things alleged therein do not constitute any offense against the laws or sovereignty of the United States."

As in No. 776, Judge Woods sustained the demurrer, and entered a final judgment thereon in favor of the defendants, and the present writ of error was sued out by the Government.

The constitutional and statutory provisions, both national and State, involved in this case are the same as those involved in No. 776, and need not be again set forth herein.

ARGUMENT.

PRIMARY ELECTION NOT A CONDITION PRECEDENT TO OR A NECESSARY PART OF AN ELECTION.

The contention of the Government brief is, in substance, that a general primary election under State law whereat the candidates of the various parties for the office of United States Senator may be selected, being a condition precedent to the election itself which follows, becomes, and is, a necessary part of the election, and confers rights upon the United States of which it may be defrauded, and may give rise to offenses which may be punished by that Government. As we have seen, however, this is not true, at least of a West Virginia primary, because under the West Virginia statute, even where a primary has been held, a man may become a candidate for the office of Senator or Representative in the Congress of the United States by petition, and not only be voted for at the subsequent election, but actually defeat all other competitors, whether nominated at the primary or not, and take his seat in the Congress. (See W. Va. Acts 1915, Chap 26, Sec. 23, Clause 2; also page 81 of this brief.)

The simple truth would seem to be that primaries merely result in party nominations or endorsements, and these endorsements may or may not result in an election to the particular office. They are a substitute for party caucuses or conventions, and are called into being either by party agreements or are established by State statutes, and, if their rules or regulations are violated, it

becomes a question of party reform, in the one case, or of State punishment, in the other. In other words, neither the Constitution nor laws of the United States recognizes or deals either with politcial parties or their nominations, and the United States neither exercises nor enjoys any governmental rights at their hands.

AUTHORITIES RELIED UPON BY GOVERNMENT HAVE NO APPLICATION.

Counsel for the Government rely upon the following cases as authority for the position that the United States has such an interest in a primary election whereat candidates for Congress or the Senate are selected as it may be defrauded of:

U. S. v. Keitel, 211 U. S., 370;
Haas v. Henkle, 216 U. S., 462;
Curley v. U. S., 130 Fed., 1 (petition for certiorari denied, 195 U. S., 628);
U. S. v. Morse, 161 Fed., 429;
U. S. v. Aczel, 219 Fed., 917.

The indictment in the case of *United States* v. *Keitel*, supra, charged the defendants with illegally obtaining the title to certain coal lands belonging to the United States, and an order quashing this count of the indictment was reversed by this Court.

In *Haas* v. *Henkel*, supra, the indictment was for conspiring to deprive the National Government of proper service in the Department of Agriculture by corrupting an employe of that Department, and by inducing him to furnish secretly information in advance in respect to crop conditions and to is-

sue false reports contrary to the rules of the Government, which indictment was sustained.

The *Curley* case was a conspiracy in violation of the Civil Service Examination Act.

The *Morse* case alleged a conspiracy to defraud the United States in the exercise of its governmental and fiscal functions by giving false information in regard to the financial condition of a National Bank.

In the *Aczel* case the defendants were charged with conspiring to deprive citizens of their right to vote in a general election for members of Congress and United States Senators.

It is at once observed that each and all of these cases relied upon by the Government in this case, except the *Aczel* case, has for its subject matter something in which the United States is directly interested, either as the owner of property rights, or on account of some direct connection with the organized functions of the Government.

The Aczel case deals with a general election for Congressmen and Senators of the United States, has nothing to do with a primary election, and has been hereinbefore discussed and distinguished.

It is, therefore, respectfully submitted that the demurrer to each indictment has been properly sustained, and that the judgments in favor of the defendants below should be affirmed.

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February 26, 1917.